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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~980~~ 130

ISRAEL KAHAN, JACOB GELLER,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellees.

On Appeal From the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California.

JURISDICTIONAL STATEMENT.

A. J. BLACKMAN, and
MARSHALL S. SIFF,
Attorneys for Appellants.

c/o MARSHALL S. SIFF,
14416 Victory Boulevard,
Van Nuys, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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On Appeal From the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, entered on December 28, 1959, affirming the judgment of conviction by the Municipal Court of Los Angeles Judicial District of a violation of Los Angeles Municipal Code 39.04 and 33.15. A petition for rehearing was denied on January 20, 1960. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below.

The opinion of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, is unreported. A copy of this opinion is attached to this Jurisdictional Statement as Appendix A.

Jurisdiction.

This action was brought under Article 1 of Section 11.00 (m) of the Los Angeles Municipal Code pursuant to Los Angeles Municipal Code Sections 39.04 and 33.15 to prosecute appellants for the violation of the above-named ordinances, Judgment of the Appellate Department affirming the conviction was entered on December 28, 1959 and a Petition for Rehearing denied January 20, 1960. Notice of Appeal to the Supreme Court of the United States was filed in the ~~Municipal Court of Los Angeles Judicial District on or before February 10, 1960.~~ Appellate Department of the Superior Court in and for the County of Los Angeles on April 12, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1275(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Lambert v. People of the State of California, 355 U. S. 225;

Largent v. Texas, 318 U. S. 418.

The Statutes Involved.

Los Angeles Municipal Code 39.04;

Los Angeles Municipal Code 33.15;

Los Angeles Municipal Code Article 1, Section 11.00 (m)

These sections are set out in full in this statement in Appendix B.

Questions Presented.

1. Is Los Angeles Municipal Code, Section 39.04 void on its face as too vague and indefinite under the fourteenth Amendment to the Constitution of the United States of America?

2. Is Los Angeles Municipal Code, 39.04 void as applied as too vague and indefinite under the fourteenth Amendment to the Constitution of the United States of America?

3. Is Los Angeles Municipal Code, 39.04 void as applied as a deprivation of property without due process of law under the fourteenth Amendment to the Constitution of the United States of America?

4. Is Los Angeles Municipal Code, 33.15 void as applied as a deprivation of property without due process of law under the fourteenth Amendment to the Constitution of the United States of America?

5. Is Los Angeles Municipal Code 33.15 void as applied as too vague and indefinite as against the fourteenth Amendment to the Constitution of the United States of America?

6. Is Los Angeles Municipal Code 33.15 void for failure to include a notice of provision as a violation of the due process clause of the fourteenth Amendment to the Constitution of the United States of America?

Statement.

Appellants own and operate a chicken ranch in the San Fernando Valley. This is an outlying section of Los Angeles City. The particular area is and at all times pertinent to this appeal has been zoned for such use. Within the last four years high middle-income housing

tracts have been built around the ranch. The homes have been sold, in most instances, to persons who were aware of the existence of the ranch, and of its operation as a poultry and egg ranch.

The ranch is large. It covers about ten acres and holds between twenty and twenty-five thousand chickens. The ranch employs six persons besides the partners, appellants, who own it and operate it.

As the residential area grew up around appellants' ranch, the Los Angeles City Health Department received complaints concerning the flies and odors believed emanating from these premises. The Department then investigated and directed the appellants to make certain structural changes on the ranch and to adopt new methods of operation in order to control fly breeding. Particularly, these changes involved altering the watering system used to feed the chickens so that all water would drain underground, and also involved prompt removal of manure from the premises. With these instructions, appellants have substantially complied.

On April 29, 1959, there was also an order to repair a broken sewer line, within twenty-four hours, which repair was made. Later inspections by the Departments revealed a different break in the same line which appellants were then in the process of repairing.

On April 29, 1959, the same day as the twenty-four hour order to abate the broken sewer line, the Los Angeles City Health Department filed with the City Attorney of the City of Los Angeles a request for the issuance of a complaint against the appellants citing them for violations of the Los Angeles Municipal Code 39.04 (keeping a place which promotes odors and fly breeding),

and Los Angeles Municipal Code 33.15 (allowing the discharge of water closet upon the surface of the premises). At the trial there was a verdict and judgment against appellants on both counts. This judgment was affirmed on the facts by the Appellate Department of the Superior Court. Petition for Rehearing was denied.

The Questions Are Substantial.

There is a fine line between reasonable governmental supervision and the imposition of arbitrary authority. That line is spelled out in the two words, "due process." Appellants contend that in this case this line has been breached.

Argument as to Los Angeles Municipal Code 39.04.

Appellants' argument is a simple one. They are and have been doing business as chicken ranchers since 1951. This is a legal and socially desirable business. They operate in an area zoned for chicken ranching. Thus, they have the express consent of the city to engage in that business. Around their ranch have developed wealthy property interests. These neighbors are angered at the necessarily unpleasant characteristics of the chicken ranch. Their property values have been detrimentally affected by its continued existence.[1]

Now, appellants are being prosecuted under two strict liability ordinances. The first ordinance, section 39.04 of the Los Angeles Municipal Code creates an impossible standard—that of keeping the property free from conditions that "promote obnoxious odors or fly breeding." The ordinance contains, in effect, no ascertainable standard, because appellants are allowed to set up and op-

[1]See Transcript, pages 101, 102, 106, 120 and 160.

erate their ranch, and then are required to manage it in such a way as to avoid producing flies or odors, which are inherent characteristics of chicken ranches. This is an untenable paradox. For this reason, appellants contend that the court had no jurisdiction to hear this case, as the ordinance is unconstitutional on its face and as applied to a class of persons—dairy farmers, poultry raisers, commercial animal raisers in general—of which appellant is a member.

The statute describes no ascertainable standard by which "promotion of fly breeding" or "creation of obnoxious odors" can be determined, nor has such a standard been developed by the Los Angeles Health Department.[2] The law is quite clear that "in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." *Tozer v. United States,* 52 Fed. 917. Other cases applying the vagueness doctrine in different contexts are *Lanzetta v. New Jersey,* 306 U. S. 451; *Winters v. New York,* 33 U. S. 507; *United States v. Cardiff,* 344 U. S. 174.

Every farm boy knows that some odors and flies are inherent in the operation of a chicken ranch. On this all agree.[3] Thus, on the basis of this ordinance, the mere operation of a chicken ranch must be held to constitute a misdemeanor and subject its operators to a maximum fine of $500 and six months in jail for each and every day of that ranch's operation. One of the major dif-

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[2]Page 45 to page 46, line 1, of the Transcript. Transcript, page 287, lines 16 to 21. Transcript page 289, lines 14 to 20.

[3]Transcript, pages 206, 224, 287, and Arcadia ordinance, Appendix D.

ficulties in this case all through the record has been quite simply that there is no standard to judge or to determine how many flies or how much odor creates a violation of the law. This was pointed out by one of the appellants himself when being questioned by the Court. On page 154 of the transcript, Mr. Kahan said,

> "It seems to me together all the community together with charges on our place. Maybe, I believe it not convenient to live close to a poultry ranch, I believe so, but what can we do more? The Court: That is what we are going to find out today and tomorrow."

The appellants discovered shortly thereafter that "what we can do more" was go to jail.

Thus, it may be seen that if this ordinance is applied, utilizing the standard that all fly and odor problems must be eliminated, the only way that appellants can comply is by going out of business. This is in spite of the fact that appellants are operating in an area that is zoned for such use. This application of the ordinance must be held to be a deprivation of vested property rights without due process of law.

If the application of Los Angeles Municipal Code 39.04 to this class of person is upheld, then for each and every day that the appellants or persons similarly situated operate, they are criminally liable up to six months in jail and up to a fine of $500. It is clear that before this eventually can happen, the appellants must get out of business. This use of the city policy power thus becomes a brutal club in the hands of the neighbors of any animal raiser in this city or in any other city or county with a similar ordinance.[4]

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[4]See Appendix C for similar ordinances.

Argument as to Los Angeles Municipal Code 33.15.

Appellants have also been convicted of violation of Section 33.15 of the Los Angeles Municipal Code. On April 29, 1959, when the Health Inspectors were on the ranch premises, they observed a break in a sewage line leading from a house occupied by ranch employees and some of the contents spilled on the surface of the ground. They gave the appellants a written notice to abate the defect within twenty-four hours.[5]

On the same day, April 29, 1959, the inspectors filed with the City Attorney a request for the issuance of a complaint against the appellants, charging them with the above violation.[6]

The break was repaired. Then, the line became stopped again and it was opened to find the reason for the stoppage. In the course of the repair, some of the contents spilled on the surface of the ground.[7] While the repair was being made, a Health Department Inspector came on the premises on May 13, 1959, and saw the open pipe. No notice to abate was given on that date.[8]

When the difference between the two breaks was presented to the trial court by way of a motion for directed verdict, on page 73 of the transcript, the trial court rightly denied the motion. Denied it correctly because, under the ordinance, no notice or order to repair is required as a condition precedent to prosecution. If the pipe had broken two minutes before the inspector had made the inspection, the appellants would have been in

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[5]See Transcript, pages 40, 41, 42, 53, 54, 55.

[6]See Transcript, page 70, lines 16 through 18; pages 65, 66, 67.

[7]See Transcript, pages 72, 73.

[8]See Transcript, pages 63, 64.

violation. On the face of the ordinance, and as it is applied here, it makes no difference whether appellants knew or could have known of the violation, whether they had an order to repair and notice of intention to prosecute upon failure to repair, or whether there was time to repair.

In *Lambert v. People of the State of California,* 355 U. S. 225, the Court pointed to notice as a basic element of the law of due process. Reasonable legislation requires notice of a defect and a specified time in which to rectify it.

The case of the *United States v. Morrisett,* 242 U. S. 246, is here analogous. That case well illustrates the development of strict liability statutes in recent times. It points out by way of dictum that one area of valid application of a strict liability statute is in the area of public health and welfare. However, one must distinguish very clearly from the present case the situation in which a maximum of foresight is required in order to assure that a manufacturer, for example, will not put on the market a product that is dangerous to potential customers. In that situation, the only effective way to prevent the production and distribution of dangerous goods is to make an individual or a company completely and absolutely liable for anything that appears on the market under their name.

In the appellants' case, quite a different situation is found. Here, the situation is not so immediately dangerous to health as to require such drastic curtailment of citizens' rights. Here, the health of the neighborhood is not going to be immediately and urgently injured because of the existence of conditions which the city feels may be potentionally dangerous. Rather, this is a situation in which

the time element is not so severe as to require a diminished application of those elements of due process, standards, and notice that have been customery and traditional in our free society.

Reasonable legislation provides a standard to guide the people so that they may determine that conduct which is criminal and that conduct which is not. *Tozer v. United States,* 52 Fed. 917. On the face of Los Angeles Municipal Code 33.15, any repairman is criminally liable for the repair of any sewer or sink piping system if he inadvertently allows some of the contents of the pipes to fall on the ground. This may be considered a *reductio ad absurdum.* However, that is the essence of the application of the ordinance in this particular case. The application is doubly dangerous when it is realized that the ulterior motive of closing appellants' business is here involved.

Application of Similar Ordinances in Other Areas, Which Conform to Procedural Due Process.

Other jurisdictions in this immediate area have dealt with this same problem in an altogether different and reasonable manner. Ventura County Ordinance 824 sets up a standard for determining a violation of the laws relating to fly breeding. In addition, it includes a notice provision and gives time to remove the condition that is deemed a violation. Ordinance 952 of the City of Arcadia reflects their determination that the animal raising industry as a whole is a greater nuisance than its value to the community. The ranchers were given five years to amortize their investment and close down. This again is fair and reasonable.[9]

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[9]See Appendix D.

Conclusion.

These conflicts should be resolved in a manner that takes into account the interests of all concerned. They should not be resolved by the high-handed operation of a municipal government, whose hand is forced by complaining neighbors. This problem is a large one for many reasons. It is large because the expansion of metropolitan areas and its chafing effect on surrounding agricultural areas is a current and growing problem in many areas of the United States today. It is large because the industry itself is an extremely important industry. This is to say that eggs, and milk, and butter, and chickens, and rabbits, and turkeys find their way to every man's table. This is to say that financially the industry is an important industry, and that in terms of the number of people employed, it is a large industry. Yet, it is a small man's industry, and this is especially important because it is made up almost entirely of small businessmen who generally do not have the money and who do not have the energy to fight the sort of deprivations of their rights of which this case is a typical instance.[10]

How can any rancher in the poultry industry near any metropolitan area begin or remain in business when he knows that he may be criminally prosecuted for conditions that are inherent in the operation of the ranch? Who will risk his capital or his labor in the face of such uncertainty? This is an intolerable risk to place on an industry that is already extremely hazardous because of animal illness and fluctuations in the market price of its product. To what avail his effort, if the rancher's term of business depends on his neighbor's whim?

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[10]See Appendix E.

Or to what use his time and energy, if his term of business depends on a land developer's choice of site for a residential home? In this era of metropolitan expansion, ranchers in fringe areas must be given security against prosecution, if the industry itself is to remain intact and if the small businessmen that make up this industry are to remain secure in themselves and in their property rights against unwarranted and unlawful prosecution by local jurisdictions.

Respectfully submitted,

A. J. BLACKMAN, and
MARSHALL S. SIFF,
Attorneys for Appellants.

c/o MARSHALL S. SIFF,

APPENDIX A.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 4216 Trial Court No. 39596

People of the State of California, Plaintiff and Respondent, vs. Israel Kahan, *et al.*, Defendants and Appellants.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. George B. Ross, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause, be and the same is hereby affirmed.

MEMO.

The evidence is sufficient to support the conviction.

Dec. 28, 1959.

BY THE COURT.

HULS

Acting Presiding Judge.

DAVID

Judge.

.....Judge

I, HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19...., and now remaining of record in this Court.

WITNESS my hand and seal of the Court, affixed this ..... day of ....., 19.....

HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles

By..... Deputy.

APPENDIX B.

Los Angeles Municipal Code 39.04
Premises—Keeping Clean

No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water or filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly breeding.

Los Angeles Municipal Code 33.15
Cesspools, Privies Overflow

No person shall cause or permit any part of the contents of any privy vault, cesspool, water closet, urinal, or of any other sink or cistern containing any night soil, slop water or other filthy water, matter or substance, to flow, discharge or be deposited upon the surface of any lot or premises or of any public street or sidewalk or public place or into any storm drain.

Los Angeles Municipal Code Article 1, Section 11.00(m).

Violations, a Misdemeanor. It shall be unlawful for any person to violate any provision or to fail to comply with any of the requirements of this Code. Any person violating any of the provisions or failing to comply with any of the mandatory requirements, of this Code, shall be guilty of a misdemeanor. Any person convicted

of a misdemeanor under the provisions of this Code, unless provision is otherwise herein made, shall be punishable by a fine of not more than $500.00 or by imprisonment in the City Jail for a period of not more than six months or by both such fine and imprisonment. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Code is committed, continued, or permitted by such person and shall be punishable accordingly. In addition to the penalties hereinabove provided, any condition caused or permitted to exist in violation of any of the provisions of this Code shall be deemed a public nuisance and may be, by this City, summarily abated as such, and each day that such condition continues shall be regarded as a new and separate offense.

Use of the words "permit" or "suffer" implies knowledge of, coupled with a duty and power to prevent the particular act, and such knowledge must be proven to sustain a conviction.

People v. Forbath (1935), CR A 1168.

It is competent for a legislative body to declare an act criminal and make the repetition or continuance thereof a public nuisance.

People v. Lim, 18 Cal. 2d 872, 879.

APPENDIX C.

Ordinance 527. An ordinance adopting the Health Code for the County of San Bernardino.

Chapter 1, general provisions.

Section 5. Nuisances. Whenever a public nuisance shall be ascertained to exist on any premises, or in any house or other place, the Health Officer shall notify in writing any person or persons owning, or having control, or acting as agent for such premises, house, or other place to abate or remove such nuisance within a reasonable time to be stated in such notice.

Section 7. Deposit of Refuse. No person shall permit the contents of any cesspool, septic tank, water closet, sewer, or sewage, affluant, excrement, urine, slop water, butcher offal, market refuse, garbage, rubbish, cans, or any dead animal or any putrid or offensive animal or vegetable matter to remain or to be deposited or discharged upon the surface of the ground on any premises, lot, or in any building, basement, or on any public street or into any standing water or excavation or public place other than sites or places approved and so designated by the Health Officer.

Ordinance of the County of Riverside.

Ordinance 104. An ordinance prohibiting the running at large of domestic fowl or tame animals on the improved land of others and providing a penalty therefor. The Board of Supervisors of the County of Riverside, State of California do ordain as follows:

Section 1. It shall be unlawful for any person keeping or having hens, ducks, turkeys, geese, or other domestic fowl, rabbits or cattle, horses, mules, goats, sheep, within the County of Riverside to cause or permit them or any of them to go or be upon the improved premises owned or occupied by any other person without such other person's consent, or to keep or have any such fowls or animals so as to be offensive to, or to annoy any person residing in the neighborhood where they are kept or had so as to render life uncomfortable.

Section 2. Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a disdemeanor and upon conviction thereof shall be punished by fine not exceeding $50 or by imprisonment in the county jail for a term not exceeding 50 days or by both such fine and imprisonment. This was adopted October 19, 1910.

Los Angeles County Ordinance 3275.

Section 138. Rodent or Pest Harborage. A person shall not occupy, maintain, or cause, or permit another person to occupy or maintain any building, lot, premises, vehicle or other place in such a condition as to permit the breeding or harboring therein or thereon of rats, mice, fleas, bed bugs, cockroaches, lice, flies, or any other vermin. A person shall not permit accumulation of any material that may serve as a harborage for rats unless such material be elevated not less than 18 inches above the ground with clear intervening space thereunder.

APPENDIX D.

Ordinance 952. An ordinance of the City Council of the City of Arcadia, California, prohibiting the keeping of poultry, rabbits, fowl, and small animals within the city of Arcadia.

The City Council of the City of Arcadia, California, does ordain as follows:

Section 1. That for many years chickens, rabbits, poultry, and other domestic animals have been kept and maintained within the city of Arcadia. That the city of Arcadia as originally developed, consisted of a small business area and a large number of ranch-type lots with single-family dwellings there upon, upon which were raised and maintained large numbers of chickens, rabbits, poultry and other domestic animals. That Arcadia has experienced a phenomenal growth and development even in excess of that experienced in Southern California generally since the termination of World War II; that as a result of such growth and development the population of the city has increased from 13,182 to 35,038 within the last ten years. That all vacant land within the City of Arcadia had been or is in process of being subdivided into lots substantially in compliance with the city's subdivision ordinance requiring lots to have a minimum of 7,500 square feet. That in recent years, the lack of vacant land, the need for homes and the economic decline of agricultural pursuits in the city have all resulted in the subdivision of large areas of the city formerly devoted to agriculture and ranching pursuits; that the influx of residents

has resulted in people living in close proximity to premises upon which are kept and maintained large flocks of poultry; that the raising of poultry, which was once a gainful occupation followed by a vast number of people in the City of Arcadia with no appreciable ill effect on others by reason of distances of such flocks from neighboring residences, has now become a marginal occupation causing the annoyance and a health menace to the majority of the citizens of this community; that such annoyance and health menace is increased by the fact that it is not economically feasible to use effective methods of fly and odor control. That investments lawfully made should have a reasonable time and opportunity for amortization; that a period of five years is a reasonable time to amortize present investments in poultry raising and to convert such investments in property to other uses. That the public health, safety, and welfare and convenience require the elimination of large numbers of poultry and fowls in the City of Arcadia at the earliest date this can be accomplished without unreasonable hardship to the owners thereof.

Section 2. That from and after January 1, 1961, it shall be unlawful for any person, firm, or corporation to keep or maintain upon any premises in the city of Arcadia chickens, rabbits, poultry or fowl, or other than homing pigeons, in excess of ten fowl or birds and a total of not to exceed five small animals (and the offspring of each thereof until such offspring is capable of being raised or maintained independently of full-growth members of the same species.)

Section 3. The city clerk shall certify to the adoption of this ordinance; etc.

ORDINANCE No. 824

AN ORDINANCE OF THE COUNTY OF VENTURA REPEALING SECTIONS 4111.21, 4115, 4116, 4116.1 AND 4116.2 OF THE VENTURA COUNTY ORDINANCE CODE; AMENDING SECTIONS 4111.1, 4111.2 AND 4111.3 THEREOF; AND ADDING SECTIONS 4110, 4110.1 4110.2 AND 4130 TO 4141 INCLUSIVE THERETO, RELATING TO GARBAGE AND FLY CONTROL AND THE DUTIES OF THE HEALTH OFFICER.

The Board of Supervisors of the County of Ventura, California, does ordain as follows:

SECTION 1.

Sections 4111.21, 4115, 4116, 4116.1 and 4116.2 of the Ventura County Ordinance Code are repealed.

SECTION 2.

Sections 4110, 4110.1 and 4110.2 are added to the Ventura County Ordinance Code to read as follows:

Sec. 4110—Inspection. It is the duty of the Health Officer whenever he shall have cause to suspect that any violation of this Chapter exists in any house, garage, shed, cellar, or building of any kind, or on any lot, farm, ranch or other land, or on any other premises, to enter upon such premises in the daytime and inspect to determine whether or not such violation exists thereon.

Sec. 4110.1—Demand for Admittance. Whenever the Health Officer shall have cause to suspect that any violation of this Chapter exists upon any

premises, he may, after displaying identification, demand entry thereon in the daytime. Every person who owns, occupies or otherwise is then in possession of such premises and who, after such display and demand, refuses or wilfully delays to open the same and admit an inspection thereof shall be guilty of a misdemeanor and subject to punishment upon conviction thereof by a fine not exceeding fifty dollars ($50) or by imprisonment in the county jail for not over five (5) days or by both such fine and imprisonment.

Sec. 4110.2—Identification. The Health Officer shall furnish each of his deputies and inspectors with identification in such form as he shall prescribe.

SECTION 3.

Section 4111.1 of the Ventura County Ordinance Code is amended to read as follows:

Sec. 4111.1—Notice to Abate. Whenever a nuisance endangering the public health shall in the opinion of the Health Officer be ascertained to exist on any premises or in any dwelling or other place, the Health Officer shall notify in writing the owner of such premises or dwelling, his agent or the person having control of such premises, dwelling or other place, to abate or remove such nuisance.

SECTION 4.

Section 4111.2 of the Ventura County Ordinance Code is amended to read as follows:

Sec. 4111.2—Form of Notice. The written notice required by Section 4111.1 shall state the Section or

Sections of this Chapter being violated and the specific nature of the violation and shall grant at least five (5) days for the person notified in accordance with Section 4111.1, to abate or remove the nuisance, provided that such notice need grant only twenty-four (24) hours in cases of violation of Section 4114.

SECTION 5.

Section 4111.3 of the Ventura County Ordinance Code is amended to read as follows:

Sec. 4111.3—Abatement. Upon the neglect or refusal of any owner, his agent or the person having control of any premises or dwellings as are referred to in Section 4111 to comply with a notice given under Section 4111.1, the Health Officer may abate such nuisance and the owner of such premises or dwelling, his agent or the person having control of the premises or dwelling shall be liable to the County for the cost of such abatement to be recovered in a civil action, or the Health Officer may report the violation to the Board who shall at once require the District Attorney to take the necessary steps to have the nuisance abated.

SECTION 6.

Article 2, Sections 4130 to 4141 inclusive are added to Chapter 1 of Division 4 of the Ventura County Ordinance Code to read as follows:

ARTICLE 2—GARBAGE AND FLY CONTROL

Sec. 4130—Garbage Defined. Garbage means and includes butcher offal; market refuse; any dead animal or bird; decayed, waste or discarded food; animal and vegetable refuse from any food handling

place or residence; or any putrid or offensive animal or vegetable matter. The term garbage does not include manure.

Sec. 4131—Storage. It is unlawful for any person to store or keep garbage in such a manner that flies or vermin breed therein. Such storage is not an ordinary or reasonable process of agriculture.

Sec. 4132—Disposal. It is unlawful for any person to place, deposit or discharge garbage, cans or rubbish on any street or highway, or in any standing water, watercourse, open pit or excavation, or upon the surface of the ground, or in any place except a public dump or other site approved and designated by the Health Officer as a dumping site.

Sec. 4133—Feeding Garbage to Hogs. It shall be unlawful for any person or persons to feed garbage not originating on the premises to hogs unless such feeding shall be upon feeding floors of concrete, so constructed as to permit controlled drainage in a manner not to create a nuisance. All such feeding floors and surrounding areas shall be maintained in a sanitary condition.

Sec. 4134—Elevated Cages. Every person who keeps any rabbits or poultry in a cage elevated above the floor or ground so that the excrement of such rabbits or poultry drops to the floor or ground beneath such cage shall treat, process or periodically remove such droppings so that the manure collected under such cage is not a breeding place for flies.

Sec. 4135—Breeding Place Defined. Rabbit or poultry manure is a breeding place for flies if it con-

tains an average, from not less than 5 samples taken not less than 3 feet apart, in excess of 20 living fly larvae for each one-half pint of manure sampled.

Sec. 4136—Notice. If the Health Officer, determines that rabbit or poultry manure under any cage or cages is a breeding place for flies he shall in writing immediately notify the owner or person in charge of said cage or cages of his determination and shall direct such owner or person to treat, process or remove said manure within 14 days so that the manure remaining under such cage or cages is not a breeding place for flies.

Sec. 4137—Treatment. Within 14 days after receiving notice in writing from the Health Officer that rabbit or poultry manure under his cage or cages is a breeding place for flies the owner or person in charge of said cage or cages shall treat, process or remove said manure so that the manure remaining under said cage or cages is not a breeding place for flies.

Sec. 4138—Inspection. Immediately upon the expiration of said 14 day period the Health Officer shall inspect the manure under said cage or cages and determine whether it is a breeding place for flies.

Sec. 4139—Notice. If the Health Officer determines that such manure is a breeding place for flies, he shall in writing immediately notify said owner or person in charge of said cage or cages of his determination and shall direct said owner or person in charge to remove all accumulated manure under said cage or cages at least once every seven days.

Sec. 4140—Removal of Manure. Immediately upon receiving such written notice from the Health Officer, the owner or person in charge of cage or cages shall, at least once every 7 days for a period of 6 months thereafter, remove all manure which has accumulated under said cage or cages, clean the area thoroughly and apply larvacide to the floor or ground upon which the manure accumulated. Said owner or person in charge shall keep a written record showing the date of said removal and cleanup, and the disposition of the manure so removed, and shall display said record to the Health Officer when requested to do so by the Health Officer. Every person who fails or refuses to comply with the provisions of this section is guilty of a misdemeanor.

Sec. 4141—Stockpiling Manure. The Health Officer shall also inspect rabbit and poultry manure which is not under elevated cages. If he determines that such manure is a breeding place for flies, he shall in writing direct the owner or person in charge of the premises upon which said manure is located to treat or process said manure to prevent fly breeding therein or the escape of adult flies therefrom. The treatment of said manure directed by the Health Officer may include, but is not limited to, placing in fly tight containers or enclosures, covering with polyethylene tarpaulins, spraying with larvacide or insecticide, fumigating, heating, burning or burying. Every person who fails or refuses to comply with a directive of the Health Officer made pursuant to this section is guilty of a misdemeanor.

PASSED, APPROVED AND ADOPTED this 4th day of August, 1959.

A. C. AX

Chairman, pro tempore
Board of Supervisors, County of Ventura
State of California

ATTEST:

ROBERT L. HAMM, County Clerk
of the County of Ventura and
ex-officio Clerk of the Board of
Supervisors, County of Ventura,
State of California

E. SHIRLEY WEEKS

Deputy Clerk

APPENDIX E.

In the California Information Almanac, Revised and Edited by A. Stone, 1958 edition, California Almanac Company Publishers, the following statement appears on page 33.

> "Poultry raising like the dairy industry also became an enterprise of large proportions during the earlier 1900's. The industry is especially significant for two reasons. First, because it is one of the most widely diffused in the state and flourishes equally well in such widely separated districts as Pelatoma, San Fernando Valley, and San Diego County. Second, because it has a peculiar social significance. Since it can be carried on with relatively little capital on small tracts of land and when given proper attention furnishes at least a moderate income. Poultry raising has attracted large numbers of people of small means who have found it a more healthful occupation and a greater measure of independence than could have been found from employment or trade within the cities."

The following statement appears on page 243 of the California Information Almanac.

> "Egg production and the flocks maintained are primarily on small farms of 1-20 acres with 5 acres predominant."

The following statement appears on page 410 of the California Information Almanac regarding Los Angeles County.

> "The county is losing much agricultural acreage to the spreading residential and business sections. Los Angeles County is still number one in the state in chicken eggs."

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 8
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. ~~989~~ 130

ISRAEL KAHAN, JACOB GELLER,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
By SAMUEL C. PALMER, III,
Deputy City Attorney,
40-M City Hall,
Los Angeles 12, California,
Attorneys for Appellee.

ker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term, 1959

No. .....

ISRAEL KAHAN, JACOB GELLER,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the order of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered December 28, 1959, be affirmed and/or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

The defendants were duly arraigned on a verified complaint filed May 14, 1959, charging them with violating Sections 34.00(a), 39.04, and 33.15 of the Los Angeles Municipal Code, in Counts I, II, and III, respectively. The case was set for a trial by jury on June 10, 1959, in Division 70 of the Municipal Court of the Los Angeles Judicial District and was subsequently transferred to Division 69 of said court for trial. The defendants were acquitted of Count I and convicted of Counts II and III. An appeal was duly taken to the Appellate Department of the Superior Court, whereupon the judgment of the lower court was affirmed. The defendants lodge their appeal in this Court by virtue of Title 28, United States Code, Section 1275(2).

I.

The Purported Federal Questions Before This Court Were Never Presented to the State Courts.

The transcript of docket reflects the fact that the appellants failed to raise any constitutional question by demurrer to the complaint, as provided in Section 1004, Penal Code of the State of California. (See App. A, p. 1.) It further shows a pronounced absence of a motion for the arrest of judgment, under Section 1185, Penal Code of the State of California. (App. A, p. 1.)

The original Reporter's Transcript indicates that a singular constitutional assault was made, the motion to dismiss Count I, Section 34.04(a) of the Los Angeles Municipal Code. [Original Rep. Tr. p. 2, line 20, to p. 3, line 12.] The appellants were acquitted of this charge.

The motion to dismiss Count II, Section 39.04, Los Angeles Municipal Code, was predicated upon a non-fed-

eral ground, a purported variance between the pleading and proof. [Original Rep. Tr. p. 73, lines 1-6; also p. 72, lines 3-26.]

A motion for a directed verdict was recorded in the original Transcript of Docket as to Counts I and III, p. 2 (Sec. 33.15 Los Angeles Municipal Code). It does not appear in the original Reporter's Transcript, however. Since no grounds appear in the record, it must be presumed that the appellants asserted through their motion the only ground available upon which such a motion could be made under California law. It is:

> "Disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such verdict were given."
>
> *Estate of Lances*, 216 Cal. 397, 400; 14 P. 2d 768.[1]

Hence, it is clear that merely a question of the extent and cumulation of evidence was thus placed before the trial court. Certainly, this does not purport to raise a federal issue. Evidentiary questions are state matters. (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031.) Assuming for the sake of argument that a constitutional question could be inferred from such a motion, it nevertheless still lacks the necessary punctilio in naming just how the federal constitution has been offended.

Therefore, by the failure to raise constitutional questions at the trial level, the Appellate Department of the Superior Court, bound by established California law, did

---

[1]There is no statutory provision under California law for such motion.

not and could not examine them afresh. (*People v. Alvidrez*, 158 Cal. App. 2d 209; *MacKenzie v. Anglo*, 82 Cal. App. 2d 254, 263). One cannot sleep upon his guarantees and then for the first time assert them on appeal. Sandbagging for appeal is simply not permitted in California.

This Court has consistently held that a constitutional right may be forfeited in a criminal case by failure to make a timely assertion of it. (*Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834; *Michel v. Louisiana*, 350 U. S. 91, 100 L. Ed. 83, 92.) The appellants' claim lacks the necessary currency.

The next corollary that must follow is an established rule of this Court: that a refusal to review federal questions will lie when they are not presented to the highest state court. (*Hedgpeth v. North Carolina*, 334 U. S. 806, 92 L. Ed. 1739.)

It is not to be idly observed that this precise defect exists when one scrutinizes the constitutional complaints lodged in the Appellate Department of the Superior Court and those which are now placed before this Court. With possibly one exception, the challenges of constitutionality contained in the jurisdictional statement are simply different from those tardily presented to the state court. (See App. B, pp. 2-4.)

It is fundamental that the reluctance of the federal courts to issue injunctions against city officials restraining their enforcement of criminal ordinances, does lead them to adopt the most innocent interpretation of the ordinance attacked a unconstitutional until the state courts have ruled otherwise, or, at least until local officials have acted on an interpretation making the ordinance unconstitutional. (*City of Manchester v. Leiby*, 117 F. 2d 661.)

II.

The Highest State Court Affirmed the Judgment on Valid State Grounds.

The highest state court having jurisdiction of this case, the Appellate Department of the Superior Court, delivered a one sentence opinion: "The evidence is sufficient to support the conviction." (See App. A, p. 1, Jurisdictional Statement.) This "Memo." is tantamount to no opinion at all. However, if considered as such, it indicates that the state court summarily disregarded the purported constitutional issues and decided the cause on valid state grounds.

The ordinances challenged by appellants include a number of alternative acts linked together by the preposition "or" (see App. B of Jurisdictional Statement), upon any one of which the court could have based its decision. For example, under Section 39.04 of the Los Angeles Municipal Code the appellants could have been convicted of permitting to remain on the premises "any accumulation of offal" rather than "material which creates offensive and obnoxious odors or promotes fly breeding." Under Section 33.15, Los Angeles Municipal Code, appellants could have been found to have caused [*knowingly*][1] (*People v. Forbath* (1935), CR A 1168; 5 Cal. App. 2d Supp. 767), the contents of a urinal to flow on the premises.

It is submitted that the state court merely affirmed the judgment without opining the law of the case. When the State Appellate Court delivers no opinion, and it appears that the judgment *might* have rested on non-federal

---

[1]Curiously, the Appellate Department has determined that this public health ordinance would require *mens rea*, or scienter.

grounds, this Court will not take jurisdiction to review the judgment. (*Stembridge v. State of Georgia,* 343 U. S. 541, 96 L. Ed. 1130).

III.

Conclusion.

Since the appellants failed to seasonably assert their purported constitutional claims, and since the decision of the Appellate Department of the Superior Court never reached a single constitutional issue, the appellee submits that appellants present no substantial question for decision of this Court. It is therefore urged that the order from which the appeal is sought should be affirmed, or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
By SAMUEL C. PALMER, III,
Deputy City Attorney,
Attorneys for Appellee.

APPENDIX A.

Stats. 1951, c. 1674, p. 3841 (*Penal Code Section 1004*).

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears on the face thereof, either:

(1) If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

(2) That it does not substantially conform to the provisions of Sections 950 and 952, and also 951 in case of an indictment or information;

(3) That more than one offense is charged, except as provided in Section 954;

(4) That the facts stated do not constitute a public offense;

(5) That it contains matter which, if true, would constitute a legal justification or excuse for the offense charged, or other legal bar to the prosecution.

Stats. 1951, c. 1674, p. 3851 (*Penal Code Section 1185*).

A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict against the defendant on a plea of former conviction, former acquittal, or once in jeopardy. It may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, Penal Code, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. When determined, the order must immediately be entered in the minutes.

APPENDIX B.

1. Pertinent portions of Appellants' Opening Brief in the Appellate Department of the Superior Court. (Page 6, lines 11 to 28):

> UNCONSTITUTIONALITY OF L. A. MUNICIPAL CODE 39.04 and 33.15 IN ITS APPLICATION TO THESE PARTICULAR DEFENDANTS.
>
> 1. That the ordinance 39.04, is unconstitutional, because police regulations must be reasonable and free of oppression. This ranch is operating in an area zoned for the activity taking place. Inherent in the operation of this chicken ranch are such things, including, but not limited to, odors and flies.
>
> 2. This prosecution under Count 3, Los Angeles Municipal Code 33.15 is a denial of equal protection of the laws. Such is the case, because it is discriminatory as to these defendants, since the usual 24 hour period or more allowed by the Health Department for the correction of defects was not given in this instance.
>
> 3. This prosecution under Count 3, Los Angeles Municipal Code 33.15 is a violation of due process and equal protection of the laws in that the direction to abate the sewage nuisance on April 29, 1959, within 24 hours, was given concurrently with the filing of a Complaint in Los Angeles Municipal Court on April 29, 1959.
>
> Page 53, also, Pages 65, 66, and 67 of the Transcript.

2. Pertinent portions of Appellants' Petition for Rehearing. (Page 1, lines 21 to 32; Page 2, lines 1 to 32; P. 3, lines 1 to 6):

I

The City Ordinance, L. A. M. C. 39.04, under which Appellants were convicted is arbitrary, capricious and unreasonable, on its face and as construed and applied is violative of the Fourteenth Amendment to the United States Constitution and has resulted in a miscarriage of justice under Article VI, Section 4½ of the California Constitution for the following reasons:

1. That there was no standard for the trier of fact to apply. Inherent in the operation of a chicken ranch are such things, including, but not limited to, fly breeding and odors. That there is nothing in the ordinance to distinguish an activity in which "manure, garbage, offal, rubbish, stagnant water, and filthy and offensive matter, and a material which created offensive and obnoxious odors and promoted fly breeding" *are inherent in the operation of said activity from an activity in which said things are not inherent.*

That fly breeding commences the moment a chicken deposits its manure on the ground and an adult fly lays its eggs in said manure. This is almost instantaneous, because chicken manure is one of the most natural breeding grounds for flies. Further, fly larvae buries itself in the ground almost as much as 4 feet and cannot be eradicated by insecticides or other means. It would appear from the wording that a person is in violation of 39.04 L. A. M. C. for just allowing manure to drop on the premises. The

attention of the Court is called to L. A. M. C. 34.00 (a), which provides for removal of manure at least twice a week, which has dropped on the premises. L. A. M. C. 34.00 (a) appears to allow the dropping of manure *by chickens on a chicken ranch,* but provides for at least twice a week removal of the accumulation from the premises if it promotes fly breeding and odor L. A. M. C. 39.04, which is in issue, does not allow *any* accumulation of manure at all for any length of time which promotes fly breeding and odors. The implication to be drawn from this is that the application of 39.04 L. A. M. C. to a chicken ranch is improper.

2. *There must be a standard so that the chicken rancher knows at what point he is in violation of the law. There must be scienter on his part that the standard has been violated.*

Is there violation of law when larvae are found on the premises? Or, is it a violation of law when the next stage, fly pupae, are found on the premises? Or is the standard the existence of a public nuisance?

Fly larvae and earthworms are somewhat similar in appearance. What if the chicken rancher believed the maggots were earthworms? Also, the mere presence of flies does not mean the ranch in question is breeding them, for chicken manure attracts flies from other areas.

For the foregoing reasons, the appellants contend that L. A. M. C. 39.04 was unconstitutional in its application to these appellants, and the evidence was therefore insufficient to support the conviction.